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In the Supreme Court of the United States

No. 79-614

STOUDT'S FERRY PREPARATION COMPANY,
Petitioner

vs.

MARSHALL, RAY, SECRETARY OF LABOR
UNITED STATES DEPARTMENT OF LABOR,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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IN THE SUPREME COURT OF THE UNITED STATES

No. ——

STOUDT'S FERRY PREPARATION COMPANY,
Petitioner

vs.

MARSHALL, RAY, SECRETARY OF LABOR
UNITED STATES DEPARTMENT OF LABOR
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Petitioner, Stoudt's Ferry Preparation Company, respectfully prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Third Circuit, entered in this proceeding on July 19, 1979.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit, affirming the decision of the United States District Court for the Eastern District of Pennsylvania, is not yet officially reported. A copy of the opinion is printed in Appendix A hereto (App. 1a-12a).

The opinion of the United States District Court for the Eastern District of Pennsylvania is not officially reported. The order of the United States District Court is printed in Appendix B hereto (13a-14a). The District Court rendered its opinion from the bench after the trial, and the reasons given by the District Court from the bench in support of its decision are set forth in the trial transcript, said pages of the trial transcript being printed in Appendix B (15a-19a).

JURISDICTION

The judgment of the United States Court of Appeals was entered on July 19, 1979. The jurisdiction of this Court is invoked pursuant to 28 U.S.C.A. §1254(1), §2101(c).

QUESTIONS PRESENTED

1. Does a plant engaged in activity wholly unrelated to the extraction of minerals from their natural deposits and from the preparation of any such minerals after extraction fall within the ambit of the Federal Mine Safety and Health Act of 1977, 30 U.S.C.A. §801 et seq., specifically within the definition of "coal or other mine" as that term is defined in 30 U.S.C.A. §802(h)?

2. Does the Fourth Amendment to the U.S. Constitution require the Secretary of Labor to obtain a search warrant authorizing entry upon the private, commercial premises of a separating plant, which separates river waste material into burnable and non-burnable material, before conducting an inspection under the Federal Mine Safety and Health Act of 1977, 30 U.S.C.A. §801, et seq., in circumstances where the government makes no claim of emergency or exigency, a violation if committed would be difficult to conceal, and there is no showing of any history of close and pervasive regulation of separating plant operators?

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The statute involved is the Federal Mine Safety and Health Act of 1977, 30 U.S.C.A. §801 et seq., specifically the following sections: 30 U.S.C.A. §§801, 802 (h), 802 (i) and 813, the provisions of which are set forth in Appendix C (App. 20a-23a). The constitutional provision involved is the Fourth Amendment of the U.S. Constitution, the language of which is set forth in Appendix D (App. 24a).

STATEMENT OF THE CASE

This action was instituted by the Secretary of Labor, U.S. Department of Labor, under the Federal Mine Safety and Health Act of 1977, 30 U.S.C.A. §801 et seq. (hereinafter the "Act"), seeking injunctive relief against Stoudt's Ferry Preparation Company (hereinafter "Stoudt's Ferry") which would direct Stoudt's Ferry to permit authorized representatives of the Secretary of Labor to enter upon and inspect its non-public business premises. In response to the complaint, Stoudt's Ferry filed a motion to dismiss for lack of subject matter jurisdiction and a motion to dismiss for failure to state a claim upon which relief can be granted.

On August 25, 1978, a hearing was held in the United States District Court for the Eastern District of Pennsylvania. The Court ordered the trial of the action on the merits to be advanced and consolidated with the hearing on the application for a preliminary injunction pursuant to Rule 65 (a) (2) of the Federal Rules of Civil Procedure. After hearing testimony from Herman Yudacufski, President of Stoudt's Ferry, the Court rendered a decision from the bench denying Stoudt's Ferry's motion to dismiss for lack of subject matter jurisdiction and motion to dismiss for failure to state a claim upon which relief can be granted, and the Court granted a permanent injunction enjoining Stoudt's Ferry from denying the Secretary of Labor or his authorized representatives entry upon and access to its premises and enjoining Stoudt's Ferry from refusing to permit the inspection of its facility pursuant to the Federal Mine Safety and Health Act of 1977. On August 29, 1978,

the District Court entered its order which denied Petitioner's aforesaid motion to dismiss and which granted the aforesaid permanent injunction. Stoudt's Ferry filed an appeal to the Court of Appeals for the Third Circuit which, in a judgment entered on July 19, 1979, affirmed the decision and order of the District Court.

The testimony at the hearing before the District Court showed that the facility operated by Stoudt's Ferry, to which the Secretary of Labor seeks entry pursuant to the Federal Mine Safety and Health Act of 1977, is utilized to process waste material which Stoudt's Ferry buys from the Commonwealth of Pennsylvania; the Commonwealth obtains the waste material from the Schuylkill River. The Commonwealth of Pennsylvania deposits the material it obtains from the river in a basin near the river. Stoudt's Ferry uses a front-end loader to transfer the waste material from the basin area next to its plant to the feed area into the plant, from which the waste material is transported into the plant on a conveyor belt. Pursuant to a sink and float process utilizing a specific gravity of seven, the waste material merely is separated into two piles, one of burnable material and one of non-burnable material. Thus, Stoudt's Ferry's facility merely separates the waste material into two piles.

Stoudt's Ferry employs four people at its plant. Three employees work on the first shift and one employee works on the second shift. On the first shift, one employee transports the waste material from the river basin to the stockpile area from which the material is fed into the plant on a conveyor belt. Another employee just watches the plant, which is wholly automated, separate the waste material into the two piles of burnable and non-burnable material. The

third employee weighs the material being sold from each of the piles as it is sold to customers of Stoudt's Ferry. On the second shift, the sole employee merely observes the operation of the automatic plant as it separates the waste material into the two piles of burnable and non-burnable material.

Stoudt's Ferry's operation is not involved or connected in any way with the process of *extracting* minerals from the *natural* deposits or preparing said minerals after *extraction*. The burnable material and the non-burnable material which make up the waste material Stoudt's Ferry purchases from the Commonwealth is composed of substances which were *previously* extracted by some unknown party from their *natural* deposits and which subsequently, by one means or another, got into the river; thus, it is clear that when the Commonwealth of Pennsylvania removes the waste material from the river, it is *not* extracting the waste material from its natural deposits.

The record also reflects that the pile of burnable material, which is separated from the non-burnable material in the river waste purchased by Stoudt's Ferry from the Commonwealth, is *not* anthracite, bituminous, or lignite; instead it is an inferior grade of "fuel" which lacks the ash content, carbon content and B.T.U. output of anthracite, bituminous and lignite coal and which sells for about one-third of the market price of the aforesaid coal. The record reflects that the burnable material is purchased "as is" from Stoudt's Ferry; the purchasers then blend the burnable material with other materials to make it a usable fuel.

The record establishes that Stoudt's Ferry does not prepare the burnable or non-burnable material in accordance with specifications given to it by anyone else, but

instead merely separates the waste material into two separate piles and sells it "as is" to its customers.

Moreover, the record reflects that neither Stoudt's Ferry nor the Commonwealth of Pennsylvania from whom Stoudt's Ferry buys the river waste material, has any connection whatever with any operation involved in the extraction of the material from its natural deposits.

The record reflects that on May 18, 1978, Charles Weimer, a representative of the Secretary of Labor, appeared at the premises of Stoudt's Ferry seeking to enter onto the premises and into the facility in order to conduct an inspection pursuant to the Federal Mine Safety and Health Act of 1977, that Charles Weimer did not present a search warrant, and that the foreman at the Stoudt's Ferry plant would not allow Mr. Weimer onto the premises to conduct an inspection. The record is completely void of any evidence whatever which would provide a basis for a finding of probable cause for the issuance of a search warrant authorizing entry upon and inspection of Stoudt's Ferry's premises. The governmental agency made no claim of emergency or exigency, did not assert that Stoudt's Ferry has probably committed a violation, did not show that a violation, if committed would be easy to conceal, and presented no evidence that the separating plant operated by Stoudt's Ferry has historically been, or for that matter presently is, the subject of close and pervasive government regulation. Indeed, the record does not reflect that Stoudt's Ferry operates a federally licensed business.

REASONS FOR GRANTING THE PETITION

The opinion of the Court of Appeals for the Third Circuit contained two holdings, one pertaining to the scope of the Federal Mine Safety and Health Act of 1977, and one pertaining to the constitutionality of warrantless inspections thereunder, each of which should be reviewed by the United States Supreme Court for the reasons hereinafter set forth.

The Scope of the Act

The Court of Appeals for the Third Circuit has decided an important question of federal law which has not been, but should be, settled by the U.S. Supreme Court, to wit, whether a facility needs to be involved in or connected with the process of *extracting* minerals from their *natural deposits* or with preparing *such minerals* after *extraction* in order to fall within the ambit of the Federal Mine Safety and Health Act of 1977, 30 U.S.C.A. §801 et seq. The Court of Appeals for the Third Circuit has held that Stoudt's Ferry falls within the ambit of the Act and, therefore, must comply with the Act and the regulations promulgated thereunder even though the facility operated by Stoudt's Ferry is not involved or connected in any way with the process of *extracting* minerals from their *natural* deposits or preparing said minerals *after extraction*. The decision of the Court below, if it is allowed to stand, will have the effect of substantially broadening the scope of the

Act and will impose the burden of compliance therewith on businesses which prior to this decision would have been outside the scope of the Act.

The decision of the Court of Appeals for the Third Circuit is inconsistent with and in conflict with the definition of "coal or other mines" set forth in 30 U.S.C.A. §802(h) and with the legislative history of the Federal Mine Safety and Health Act of 1977 which require that a facility be involved in or connected with the process of extracting minerals from their natural deposits or with preparing such minerals after extraction in order to fall within the ambit of the Act. 30 U.S.C.A. §802(h)(1) defines "coal or other mines" as "an area of land from which materials *are extracted* in non-liquid form, or if in liquid form, *are extracted* with workers underground," and then goes on to include in the definition, "private ways and roads appurtenant *to such area,*" and "lands, excavations, underground passageways, shafts, slopes, tunnels and workings, structures, facilities, equipment, machines, tools, or other property including impoundments, retention dams and tailing ponds, on the surface or underground, used in, or to be used in, or resulting from, *the work of extracting* such minerals *from their natural deposits* . . . or used in, or to be used in, the milling *of such minerals*, or the work of preparing coal or other minerals. . . ." 30 U.S.C.A. §802(i) states that "work of preparing the coal means the breaking, crushing, sizing, cleaning, washing, drying, mixing, storing and loading of bituminous coal, lignite or anthracite, and such other work *of preparing such coal as is usually done by the operator of the coal mine.*" Thus, the aforesaid language of the definitional section of the Act makes clear that a facility such as Stoudt's Ferry, which is not involved or connected in any way with the process of extracting minerals from

their natural deposits or preparing such minerals after extraction, does not fall within the scope of the Act.

The purpose of the Federal Mine Safety and Health Act of 1977 is to impose stricter coal mine regulations to prevent death and injury in mines, and to prevent mine-related accidents and disasters. *National Independent Coal Operators' Association vs. Kleppe,* 1976, 423 U.S. 388, 46 L.Ed. 2d 580. As stated in the legislative history of the Act, it was enacted "to protect the health and safety of coal miners, and to combat the steady toll of life, limb and lung, which terrorizes so many unfortunate families." House Report (Education and Labor Committee) No. 91-563, October 13, 1969, 1969 *U.S. Code Cong. & Adm. News* 2503. An examination of the legislative history of the Act makes clear that the Act, which was first enacted in 1969, was intended only to apply to those activities directly connected with or related to the *extraction* of anthracite, bituminous or lignite coal from its natural deposits. 1969 *U.S. Code Cong. & Adm. News* 2503-2610.

Thus, purchase by Stoudt's Ferry of the river waste material from the Commonwealth of Pennsylvania and Stoudt's Ferry's subsequent separation of the waste material into two piles of burnable and non-burnable material pursuant to a sink and flow process simply is not the kind of activity that has anything to do with mining and clearly does not fall either within the purpose or the language of the Act.

Thus, it is respectfully submitted that the United States Supreme Court should settle this important question of federal law of whether a facility needs to be involved in or connected with the process of *extracting* minerals from their *natural deposits* or with preparing *such minerals* after

extraction in order to fall within the ambit of the Federal Mine Safety and Health Act of 1977, thereby clarifying what businesses must comply with the Act and the burdensome regulations promulgated thereunder.

The Constitutionality of Warrantless Inspections Under the Act

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The decision of the Court of Appeals for the Third Circuit that the Fourth Amendment of the U.S. Constitution does not require the Secretary of Labor to obtain a search warrant authorizing entry upon private, commercial premises before conducting an inspection under the Federal Mine Safety and Health Act of 1977, thereby upholding the constitutionality of the warrantless inspection provision of the Act set forth at 30 U.S.C.A. §813, decides an important question of federal law which has not been, but should be, settled by the United States Supreme Court. In addition, in *Ray Marshall vs. Douglas Dewey and Waukesha Lime & Stone Co.*, Case No. 79-C-114 (E.D. Wis., filed March 29, 1979 and May 30, 1979), *Ray Marshall vs. Halquist Stone Company, Inc.*, C.A. No. 78-C-463 (E.D. Wis., filed September 15, 1978), and *Valley Transit Mix, Inc. vs. Ray F. Marshall*, Civ. No. 79-391-B consolidated with Nos. 79-393, 79-422 and 79-454, (D.N.M., filed June 15, 1979) (the opinions in each of the foregoing presently unreported cases are printed in Appendix E), the Court, in each of those cases, held that the Secretary of Labor could not conduct warrantless inspections of the facilities involved under the Federal Mine Safety and Health Act of 1977, although the facilities involved were subject to the Act and the regulations promulgated thereunder. Thus, these lower court

decisions are in conflict with the decision of the Court of Appeals for the Third Circuit in the instant case.

Moreover, the decision of the Court of Appeals in the case *sub judice,* that the warrantless inspection provision of the Federal Mine Safety and Health Act of 1977 is constitutional and does not violate the Fourth Amendment, is inconsistent with and in conflict with the U.S. Supreme Court's opinion in *Marshall vs. Barlow's, Inc.*, 1978, 436 U.S. 307. In *Marshall vs. Barlow's, Inc.*, supra, the Supreme Court held that inspection without a warrant pursuant to Section 8(a) of the Occupational Safety and Health Act of 1970 (OSHA), which empowers agents of the Secretary of Labor to search the work area of any employment facility within OSHA's jurisdiction for safety and health hazards and violation of OSHA's regulations, violated the Fourth Amendment. Thus, the Court in *Barlow's* reaffirmed the principle set forth in *See vs. City of Seattle*, 1967, 387 U.S. 541, that a search of private commercial property is presumptively unreasonable if conducted without a warrant.

In the instant case, the Court of Appeals for the Third Circuit mistakenly relied on the exception to the search warrant requirement established in *Colonnade Catering Corp. vs. United States*, 1970 (liquor), 397 U.S. 72, and in *United States vs. Biswell*, 1972, 406 U.S. 311 (firearms), that no warrant is required to conduct inspections for "closely regulated" industries "long subject to close supervision and inspection." As stated by the Court in *Barlow's*, "(t)he element that distinguishes these enterprises from ordinary businesses is a long tradition of close government supervision, of which any person who chooses to enter such a business must already be aware." 436 U.S. at 313; 56

L.Ed. at 312. However, there was no showing in the instant case of any history of close and pervasive regulation of separating plant operators, which is the business which Stoudt's Ferry is engaged in. The Court of Appeals for the Third Circuit concluded that underground mining had been subjected to pervasive government regulation and then proceeded to use that history of government regulation to justify warrantless inspections of a separating plant which has absolutely no connection whatever with underground mining.

In short, the Court of Appeals for the Third Circuit in this case in effect has held that the government can make warrantless inspections of businesses which have no history of pervasive governmental regulations *by lumping that business in a regulatory statute* which includes businesses that have been subjected to pervasive government regulation. It is submitted that a warrantless inspection of one type of business *cannot* be justified by the history of pervasive governmental regulation of *another* type of business, and, therefore, the decision of the Court of Appeals in the case *sub judice* is in error and in conflict with this Court's decision in *Marshall vs. Barlow's, Inc.*, supra.

The Court of Appeals in support of its decision cited *Youghiogheny & Ohio Coal Co. vs. Morton,* S.D. Ohio 1973, 364 F. Supp. 45, a case in which a three-judge court concluded that the coal mining industry, like firearms and liquor, had long been pervasively regulated and that warrantless searches were reasonable in the context of mine safety investigations. The Court of Appeals' reliance on *Youghiogheny* is wholly misplaced since that case involved the inspection of deep, underground coal mines, not the inspection of a separating facility which has no connection

whatever with the mining industry. In addition, *Youghiogheny* pre-dated *Barlow's.*

Finally, it should be noted that there is no evidence that a violation of the Act or the regulations promulgated thereunder, if committed by Stoudt's Ferry, would be easy to conceal. In short, there is no evidence that a warrant requirement would impede inspection efficiency.

CONCLUSION

The Federal Mine Safety and Health Act of 1977 is a statute of national applicability, and consequently a decision is needed from this Court delineating the scope of the Act, so that businesses know with certainty whether they must comply with the Act and the regulations promulgated thereunder. The certainty created by a United States Supreme Court decision is needed all the more in view of the prolix, ambiguous definition of "coal or other mine" set forth in the Act which establishes the scope of the Act. In short, the question of whether a facility needs to be involved in or connected with the process of extracting minerals from their natural deposits or with preparing such minerals after extraction in order to fall within the ambit of the Act needs to be finally settled.

Likewise, the question of whether the Fourth Amendment to the U.S. Constitution requires the Secretary of Labor to obtain a search warrant authorizing entry upon the private, commercial premises of a separating plant, before conducting an inspection under the Federal Mine Safety and Health Act of 1977, needs to be finally settled by this Court. As noted previously, there are conflicting lower

court decisions on the subject in question. In addition, the opinion of the Court of Appeals for the Third Circuit in the case *sub judice,* for the reasons set forth supra, is inconsistent with this Court's opinion in *Marshall vs. Barlow's, Inc.,* supra.

The inevitable confusion and uncertainty pertaining to the interpretation of the statute and over the constitutionality of warrantless inspections can be eliminated by a decision from this Court.

For these reasons, the Court should issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

Respectfully submitted

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APPENDIX A

UNITED STATES COURT OF APPEALS
For the Third Circuit

No. 78-2364

RAY MARSHALL, Secretary of Labor,
UNITED STATES DEPARTMENT OF LABOR
v.
STOUDT'S FERRY PREPARATION COMPANY,
Appellant

Appeal From the United States District Court for the Eastern District of Pennsylvania
(D.C. Civil No. 78-2503)

Argued June 6, 1979
Before Weis and Garth, *Circuit Judges* and Gerry, *District Judge.**
(Opinion filed July 19, 1979)

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* Honorable John F. Gerry, United States District Judge for the District of New Jersey, sitting by designation.

Barbara Allen Babcock, Esq., Assistant Attorney General, Peter F. Vaira, Jr., Esq., United States Attorney, William Kanter, Esq., Douglas N. Letter, Esq. (argued), Appellate Staff, Civil Division, Department of Justice, Washington, D.C. 20530.

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OPINION OF THE COURT

WEIS, *Circuit Judge.*

In this appeal we determine that the word "mine" as used in the Mine Safety and Health Amendments Act of 1977 includes appellant's preparation plant, which separates a low-grade fuel from sand and gravel dredged from a riverbed. We also find the warrantless inspection provisions of the Act sufficiently distinguishable from those of the Occupational Health and Safety Act so as to withstand constitutional challenge. We therefore affirm an order of the district court permitting the Secretary of Labor to inspect the appellant's facility without a warrant.

The Commonwealth of Pennsylvania dredges the Schuylkill River and deposits the material obtained from the riverbed into a nearby basin. Stoudt's Ferry Preparation Company purchases this material and by the use of a front-end loader and a conveyor belt transports the dredged refuse to its plant. There, through a sink and float process, the material is separated into two piles, one of sand and gravel, the other of a burnable material which,

when blended with other substances, is usable fuel. The plant is fully automated and employs four people.

The company sells the sand and gravel as well as the burnable material. In 1977, of approximately 500,000 tons of dredging material processed, 64,500 tons were burnable, and of the 250,000 tons dredged in 1978, about 10,700 were in that category. The BTU output of the burnable material is far lower than that of anthracite or bituminous coal or lignite, and the market price is about one-third of anthracite. Because it is extracted by a specific gravity process, the content of the material is uncontrollable. After making a chemical analysis of the burnable substance, a utility company that had negotiated an output agreement with Stoudt's Ferry drew up a sales contract in which the product is described as "usable anthracite refuse."

In May 1978, an inspector from the Department of Labor attempted to inspect the plant under the Mine Safety and Health Amendments Act of 1977, 30 U.S.C.A. §§801-878 (1971 & Supp. 1979), but was denied entry.[1] The Secretary of Labor then sought a preliminary injunction enjoining Stoudt's Ferry from refusing to permit the in-

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[1] Section 201 of the Act, 30 U.S.C.A. §813, providing for inspections, reads in relevant part:

> "(a) Authorized representatives of the Secretary [of Labor] . . . shall make frequent inspections and investigations in coal or other mines each year for the purpose of (1) obtaining, utilizing, and disseminating information relating to health and safety conditions, the causes of accidents, and the causes of diseases and physical impairments originating in such mines, (2) gathering information with respect to mandatory health or safety standards, (3) determining whether an imminent danger exists and (4) determining whether there is compliance with the mandatory health or safety standards, or with any

spection.[2] After a hearing, the district court found that the company's operation came within the scope of §102(b) of the Act, 30 U.S.C.A. §802(h)(1), the section defining the word "mine," and that the warrantless entry provisions of the statute were constitutional. Concluding that the congressional purpose behind the Act is to give the Secretary broad authority in the mining and extraction industries, the district court found that the product sold by the company to the utility was "akin to bituminous coal, lignite or anthracite . . . [a]nd what is taking place . . . is the work of preparing coal or other minerals." As an additional basis for coverage, the district court concluded that the operation involved the extraction of sand and gravel from their natural deposits. The court, therefore, granted the Secretary's request for an injunction, but at the urging of the company, imposed a confidentiality requirement and granted a stay pending appeal.

citation, order, or decision issued under this subchapter or other requirements of this chapter. In carrying out the requirements of this subsection, no advance notice of an inspection shall be provided to any person. . . . In carrying out the requirements of clauses (3) and (4) of this subsection, the Secretary shall make inspections of each underground coal or other mine in its entirety at least four times a year, and of each surface coal or other mine in its entirety at least two times a year. . . . For the purpose of making any inspection or investigation under this chapter, the Secretary . . . shall have a right of entry to, upon, or through any coal or other mine."

[2] 30 U.S.C.A. §818 provides that

"(a)(1) [t]he Secretary may institute a civil action for relief, including a permanent or temporary injunction, restraining order, or any other appropriate order in the district court of the United States . . . whenever [the] operator or his agent— . . . .

(C) refuses to admit [an authorized] representative for the coal or other mine, [or]

(D) refuses to permit the inspection of the coal or other mine, or the investigation of an accident or occupational disease occurring in, or connected with, such mine. . . ."

I.

Congress passed the Federal Mine Safety and Health Amendments Act of 1977 to strengthen the legislation governing coal, metallic, and nonmetallic mines already in effect, the Federal Metallic and Nonmetallic Mine Safety Act, Pub. L. No. 89-577, 80 Stat. 772, and the Federal Coal Mine Health and Safety Act of 1969, Pub. L. No. 91-173, 83 Stat. 742. The Coal Act was the more comprehensive, covering miners' health as well as safety, to which the Metal Act was limited. The standards in the Coal Act were more definitive and complex and enforcement was more thorough.[3] But Congress was not satisfied that all that could be done had been done to promote health and safety in the mines. Among the improvements suggested was the adoption of one statute covering the entire mining industry and containing strengthened enforcement provisions to be administered by the Department of Labor. To meet its objectives, Congress included a broad definition of "mine" in §102(b) of the Act, reading in relevant part:

"(1) '[C]oal or other mine' means (A) an area of land from which minerals are extracted in nonliquid form or, if in liquid form, are extracted with

[3] See the introductory and background remarks of the Senate Resources Committee in the report accompanying S. 717, the legislative proposal which, as modified, became the Federal Mine Safety and Health Amendments Act of 1977, S. REP. No. 181, 95th Cong., 1st Sess. 1-6, *reprinted in* [1977] U.S. CODE CONG. & ADMIN. NEWS 3401, 3401-06.

workers underground, (B) private ways and roads appurtenant to such area, and (C) lands, excavations, underground passageways, shafts, slopes, tunnels and workings, structures, facilities, equipment, machines, tools, or other property including impoundments, retention dams, and tailing ponds, on the surface or underground, used in, or to be used in, or resulting from, the work of extracting such minerals from their natural deposits in nonliquid form, or if in liquid form, with workers underground, or used in, or to be used in, the milling of such minerals, or the work of preparing coal or other minerals, and includes custom coal preparation facilities. . . .

"(2) For purposes of subchapters II, III, and IV of this chapter, 'coal mine' means an area of land and all structures, facilities, machinery, tools, equipment, shafts, slopes, tunnels, excavations, and other property, real or personal, placed upon, under, or above the surface of such land by any person, used in, or to be used in, or resulting from, the work of extracting in such area bituminous coal, lignite, or anthracite from its natural deposits in the earth by any means or method, and the work of preparing the coal so extracted, and includes coal preparation facilities;

"(i) 'work of preparing the coal' means the breaking, crushing, sizing, cleaning, washing, drying, mixing, storing, and loading of bituminous coal, lignite, or anthracite, and such other work of preparing such coal as is usally done by the operator of the coal mine. . . ." 30 U.S.C.A. §802(h).

Commenting on this sweeping definition, the Senate Committee stated that "what is considered to be a mine and

to be regulated under this Act" was to be given the broadest possible interpretation and that doubts were to be resolved in favor of inclusion of a facility within the coverage of the Act. *See* S. Rep. No. 181, 95th Cong., 1st Sess. 1, 14, *reprinted in* [1977] U.S. Code Cong. & Admin. News 3401, 3414.

Despite the statute's expansive language and this expression of legislative intent, Stoudt's Ferry contends that it is not included within the Act's ambit because the facility's activities are not related to the extraction of minerals from natural deposits or their preparation after extraction. But the company's process of separating from the dredged refuse a burnable product "akin" to coal, which is then sold as a low-grade fuel, brings the company within the Act's coverage as the operator of a "structure" and a "facility" "on the surface . . . used in . . . the work of preparing coal or other minerals." 30 U.S.C.A. §802(h). We agree with the district court that the work of preparing coal or other minerals is included within the Act whether or not extraction is also being performed by the operator. Although it may seem incongruous to apply the label "mine" to the kind of plant operated by Stoudt's Ferry, the statute makes clear that the concept that was to be conveyed by the word is much more encompassing than the usual meaning attributed to it—the word means what the statute says it means.[4]

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[4] That the law should attribute expansive and sometimes even bizarre meanings to a word is not a novel phenomenon. At common law under Pennsylvania's ancient integrated plant doctrine, chattels forming part of an operating industrial plant became fixtures and thus part of the realty. Voorhis v. Freeman, 2 Watts & Serg. 116, 37 Am. Dec. 490 (1841). In Titus v. Poland Coal Co.,

Moreover, the record also establishes that the company processes and sells the sand and gravel it separates from the material dredged from the river. We are persuaded, as was the district judge, that in these circumstances, the sand and gravel operation of the company also subjects it to the jurisdiction of the Act as a mineral preparation facility.

II.

Relying on the Supreme Court's decision in *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978), the company further contends that an agent of the Secretary of Labor is required to obtain a search warrant before he is entitled to enter and inspect the premises. The company argues that the warrantless inspection statutory section violates the fourteenth amendment and that there were no reasonable grounds to justify the issuance of a warrant, had one been sought. The issue is clearly drawn: whether *Barlow's* renders unconstitutional the Mine Safety Act's inspection provision. As the Court's opinions in that case indicate, however, the answer is not immediately apparent.

In *Barlow's*, §8(a) of the Occupational Safety and Health Act of 1970 (OSHA), 29 U.S.C. §657(a), authorizing the Secretary of Labor to search the work area of an employment facility without a warrant, was held unconstitutional. Starting from the premise that warrantless searches of both home and commercial properties are generally unreasonable, the Court said that only if it comes

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275 Pa. 431, 119 A. 540 (1923) and Hillard Live-Stock Co. v. Amity Coal Co., 2 Lancaster L. Rev. 241 (1885), cars used to move coal within a mine were treated as realty, leading to whimsical speculation that mules which pulled the cars might also be considered real estate.

within a carefully defined exception may a statute validly authorize a search without a warrant. As recognized exceptions the Court cited that of pervasively regulated businesses, typified by *United States v. Biswell*, 406 U.S. 311 (1972) (firearms), and those closely regulated enterprises having a long history of governmental inspection and supervision, *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970) (liquor), where businessmen would have no reasonable expectation of privacy. Aware in advance of the burdens of their trade, by choosing to accept the benefits these proprietors in effect consent to the restrictions. 436 U.S. at 413. Otherwise, the reasonableness of a warrantless administrative search will depend upon the specific enforcement needs and privacy guarantees of the particular statute under review.

The Occupational Safety and Health Act covers a wide variety of enterprises affecting commerce, from the very small and simple to the large and most complex. Section 657(a) authorized the Secretary to enter any establishment or area where work was being performed by an employee and inspect all devices, apparatus, and materials. In addition, by regulation the Secretary had expanded the scope of any search to include records related to the purpose of the inspection. 29 C.F.R. §1903.3 (1978). The inspection provisions of the Mine Safety Act, by contrast, are more limited and more closely defined. Moreover, coal mining has a history of governmental regulation, first by the states, and later by the federal government. A bill was introduced as early as 1865 to create a federal mining agency, although it was not until 1910 that the Bureau of Mines was established. In 1939, an effort to extend inspection authority to the Bureau was unsuccessful, but such legislation did pass in 1941.

The Coal Mine Health and Safety Act of 1969 contained provisions for warrantless searches essentially the same as those included in the Amendments Act of 1977. In 1973, a three-judge court concluded that the coal mining industry, like firearms and liquor, had long been pervasively regulated and that warrantless searches were reasonable in the context of mine safety investigations. *Youghiogheny & Ohio Coal Co. v. Morton,* 364 F. Supp. 45, 49 & n. 3 (S.D. Ohio 1973). In reporting on the 1977 amendments, the Senate Committee noted its approval of the *Youghiogheny* case, thus indicating that the opinion reflected congressional intention with respect to the current inspection provisions. The Committee commented that it felt advance notice of inspections would undercut the Act's objectives because of the ease with which safety or health hazards could be concealed. S. Rep. No. 181, 95th Cong., 1st Sess. 1, 27, *reprinted in* [1977] U.S. Code Cong. & Admin. News 3401, 3427. *Youghiogheny* predated *Barlow's,* but we believe its reasoning essentially is still valid.[5]

Mindful of the Supreme Court's reluctance to foreclose the incremental protection afforded a proprietor's privacy by a warrant, we are persuaded that the Mine Safety Act's enforcement scheme justifies warrantless inspections and its restrictions on search discretion satisfy the reasonablness standard reasserted in *Barlow's.* Although the Mine Safety Act's coverage of enterprises has been broadened from that of the predecessor Coal Mine Safety Act to include other than coal mining, the statute is still

[5] *See also* Comment, When are Administrative Inspections Warranted? 50 U. Colo. L. Rev. 231 (1979) [hereinafter Comment, Administrative Inspections]; Comment, The Constitutionality of Warrantless OSHA Inspections, 22 Vill. L. Rev. 1214 (1977).

much more limited than OSHA and is aimed at an industry with an acknowledged history of serious accidents. Moreover, unlike OSHA, the Mine Safety Act mandates periodic inspections and is specific in that no advance warning is to be given when the inspection is to determine whether an imminent danger exists or whether there is compliance with mandatory health and safety standards or with any citations, orders, or decisions outstanding, 30 U.S.C.A. §813 (a). If the inspection is for obtaining or disseminating information about health and safety conditions, causes of accidents, or gathering of information about mandatory health and safety standards, the Secretary may give advance notice. *Id.*

It may be seen that the Mine Safety inspection provision places limitations upon the purposes for which searches may be made, limits those in which no advance notice is given, and is more narrowly drawn than the comparable OSHA section. There is consequently less likelihood of the abuses of "unbridled discretion of executive and administrative officers" which *Barlow's* found objectionable. 436 U.S. at 323. Though *Barlow's* was not impressed with the importance of surprise inspections in the OSHA setting, we are not prepared to say that the legislative judgment as to their necessity in the context of mine safety is misplaced.

Another significant difference between the statutes is that the Mine Safety Act provides for immediate judicial review by requiring the Secretary to secure an injunction in the district court if he is refused entry. 30 U.S.C.A. §818. Any unusual privacy expectations may be fully explored in that proceeding and a reasonable accommodation may be achieved. In this case, for example, the court im-

posed a confidentiality requirement upon the inspectors to protect the appellant's trade secrets.

Although the *Barlow's* dissent voiced the fear that the majority's decision endangered the inspection provisions in the Coal Mine Health and Safety Act, 436 U.S. at 339 n. 11 (Stevens, J., dissenting), we believe that there are enough major differences between *Barlow's* and the case at bar to lead to a contrary result.[6] In our view, warrantless inspections and the procedure provided for enforcement in the Mine Safety Act meet the standards of reasonableness in this pervasively regulated industry. Accordingly, the judgment of the district court will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

[6] *See* Comment, Administrative Inspections, *supra* at 241-46; 14 N. Eng. L. Rev. 119, 127 & n. 70 (1978).

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 78-2503
Filed Aug 30 1978
JOHN J. HARDING, Clerk

RAY MARSHALL, SECRETARY OF LABOR
UNITED STATES DEPARTMENT OF LABOR,
Plaintiff

v.

STOUDT'S FERRY PREPARATION COMPANY,
Defendant

ORDER

This matter came on for hearing on Plaintiff's Motion for Preliminary Injunction and Defendant's Motion to Dismiss on this 25th day of August, 1978. Upon consideration, the Court orders that the trial of the action on the merits be hereby advanced and is consolidated with the hearing of the application. The Court has considered the evidence presented, the pleadings and affidavit, the stipulation of the parties, the testimony of the witness, and the argument of counsel.

It is ORDERED that plaintiff's Motion for a Permanent Injunction is hereby GRANTED and Defendant's Motion to Dismiss is hereby DENIED.

It is further ORDERED that the Stoudt's Ferry Preparation Company, its agents and employees, and all persons in active concert and participation with it be and hereby are permanently enjoined:

1. From denying the Secretary of Labor or his authorized representatives entry to, upon or through the Stoudt's Ferry Preparation Company.

2. From receiving to permit the inspection of the Stoudt's Ferry Preparation Company.

3. From interfering with, hindering, or delaying the Secretary of Labor or his authorized representatives in carrying out the provisions of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. and the regulations promulgated pursuant thereto.

This Order shall be stayed pending appeal in the event Stoudt's Ferry Preparation Company appeals to the Court of Appeals.

Entered this 29 day of August, 1978.

(s) Edward N. Cahn, *J.*

(45) 53a

EXCERPT FROM TRANSCRIPT OF TRIAL

MR. YAMAMOTO: Yes, Your Honor.

THE COURT: I think it is a close issue. Do either of you wish to say anything further before I decide?

MR. BROBST: The only thing else I would say, Your Honor, is that even with respect to work of preparing the coal, looking at this definition, that phrase, of course, is exactly taken from H-1, and then defined in 1. I still think it all relates back again to the way that the term is being used throughout. It has to be determined that was extracted from its natural deposit. I don't think, in other words, this act covers any operation that is not connected with extraction from its natural deposit. I think that is the key.

And, I think the reason for that makes sense in terms of the purpose of the act. That is the kind of things that this act is concerned with, is that kind of operation, extracting material from their natural deposits, and not something subsequent to that, or not connected with that. And, of course, my client has absolutely no connection, even the people they buy it from, it is not being extracted from its natural deposit.

THE COURT: But, he is also in the sand

(46) 54a

business, sand and gravel.

MR. BROBST: True. Sand and gravel is the other pile. But, I don't think—

THE COURT: Which is sold.

MR. BROBST: Which is sold.

THE COURT: And, that you can argue, I think with some persuasiveness, that the sand and gravel is extracted from its natural deposits.

MR. BROBST: Okay, yes.

THE COURT: It is an elusive concept. I don't feel terribly comfortable with finding against you.

MR. BROBST: It is an awkward definition.

THE COURT: But, I look at it this way, I think the Congressional purpose was to give the Secretary broad authority in the mining and extraction industries. I don't think the act is limited to coal, although I think perhaps the Secretary's efforts are directed, especially in this part of Pennsylvania, to the coal mining industry. And, while the act is not written with clarity as to this particular problem, I think there is jurisdiction on several possible bases.

The defendant is subject to the act, in my view, because I think it is a fair conclusion that

(47) 55a

what is being sold is akin to bituminous coal, lignite, or anthracite. And, that what is taking place at the Stoudt's Ferry Preparation Company plant in Leesport is the work of preparing coal or other minerals. And, that particular phrase in 30 USCA 802, H-1 is not restricted and is not qualified by the clause extracting such minerals from their natural deposits. But, even if that clause is applicable, it seems to the Court that the sand and gravel taken from the river bed may be extracted from its natural deposits, and the act would apply on that basis.

Therefore, I deny defendant's motion to dismiss. I also will enter an order, if you have one prepared, to permit your inspector to inspect the premises. Do you have such an order?

MR. YAMAMOTO: Not at this time, Your Honor.

THE COURT: When can you prepare one for me?

MR. YAMAMOTO: I can prepare one for you and have it to you Monday or Tuesday of next week.

THE COURT: I suggest you try to have it to me in my office in Philadelphia on Monday.

MR. YAMAMOTO: Yes, Your Honor.

THE COURT: Do you wish to have some

(48) 56a

sort of a statement in which you can appeal, counsel?

MR. BROBST: My client indicates yes.

THE COURT: Put in the order that the order shall not be operable in the event of the defendant appealing to the Court of Appeals for the Third Circuit.

MR. BROBST: I take it that the order will be dated as of the date Your Honor signs it?

THE COURT: It will be dated as of the date I sign it.

Now, I understand there are no cases—

MR. YAMAMOTO: Your Honor, at the present time there are two cases. I believe you have a copy of one, which was Marshall versus BOSAC, which was also here.

THE COURT: That was before Judge Hewitt.

MR. YAMAMOTO: Before Judge Hewitt of this District. That is presently on appeal in the Third Circuit.

THE COURT: What were the facts?

MR. YAMAMOTO: That was a preparation plant. They purchased coal from miners, operators, and they prepared that coal and sold it to homes, churches, and other small—

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THE COURT: Wasn't there a question of an Interstate Commerce connection with that case?

MR. YAMAMOTO: Yes, Your Honor.

THE COURT: Which we don't have here. That has not been raised here.

MR. YAMAMOTO: That was the issue that was raised in that case. There is also another decision from Judge Gordon in the Western District of Kentucky concerning another plant which took coal and broke it up and sold it in railroad cars, sold that in Interstate Commerce. That is not recorded. I have that opinion in my office.

THE COURT: What is the holding of that opinion?

MR. YAMAMOTO: That the breaking, sizing of coal made that facility a preparation plant, which fell under the act.

THE COURT: And, it is the position of the Secretary that regardless of the coal in this case, coal in quotes, that your Secretary would still have jurisdiction over the sand operation?

MR. YAMAMOTO: Yes, Your Honor.

THE COURT: By the terms of the statute.

MR. YAMAMOTO: Yes, Your Honor.

THE COURT: I want to make it clear to

(50) 58a

the Appellate Court, the basis of your position and the basis of my ruling, which there is at least two bases for my ruling.

MR. YAMAMOTO: Fine. Thank you.

THE COURT: You may prepare an order and submit it to me.

Now, counsel, you have told me at side bar that your client is concerned about the divulgment of technical processes.

MR. BROBST: That's correct.

THE COURT: If your client desires, and you may prepare a confidentiality order that any inspector who obtains access to the premises is under Court order not to reveal any technical process or method of doing business there to anyone except his superiors in his ordinary course of business.

MR. BROBST: I think I would probably prepare such an order, Your Honor.

THE COURT: That might solve your client's problem.

I think you should realize, if he doesn't have inspection from coal mine, he will have inspections from OSHA. Somebody eventually will have a right to get in there.

(Concluded.)

APPENDIX C

TEXT OF STATUTES INVOLVED

"30 U.S.C.A. §801. Congressional findings and declaration of purpose

Congress declares that—

(a) the first priority and concern of all in the coal or other mining industry must be the health and safety of its most precious resource—the miner;

(b) deaths and serious injuries from unsafe and unhealthful conditions and practices in the coal or other mines cause grief and suffering to the miners and to their families;

(c) there is an urgent need to provide more effective means and measures for improving the working conditions and practices in the Nation's coal or other mines in order to prevent death and serious physical harm, and in order to prevent occupational diseases originating in such mines;

(d) the existence of unsafe and unhealthful conditions and practices in the Nation's coal or other mines is a serious impediment to the future growth of the coal or other mining industry and cannot be tolerated;

(e) the operators of such mines with the assistance of the miners have the primary responsibility to prevent the existence of such conditions and practices in such mines;

(f) the disruption of production and the loss of income to operators and miners as a result of coal or other

mine accidents or occupationally caused diseases unduly impedes and burdens commerce; and

(g) It is the purpose of this chapter (1) to establish interim mandatory health and safety standards and to direct the Secretary of Health, Education, and Welfare and the Secretary of Labor to develop and promulgate improved mandatory health or safety standards to protect the health and safety of the Nation's coal or other miners; (2) to require that each operator of a coal or other mine and every miner in such mine comply with such standards; (3) to cooperate with, and provide assistance to, the States in the development and enforcement of effective State coal or other mine health and safety programs; and (4) to improve and expand, in cooperation with the States and the coal or other mining industry, research and development and training programs aimed at preventing coal or other mine accidents and occupationally caused diseases in the industry."

"30 U.S.C.A. §802 Definitions

For the purpose of this chapter, the term—

(h) (1) 'coal or other mine' means (A) an area of land from which minerals are extracted in nonliquid form or, if in liquid form are extracted with workers underground, (B) private ways and roads appurtenant to such area, and (C) lands, excavations, underground passageways, shafts, slopes, tunnels and workings, structures, facilities, equipment, machines, tools, or other property including impoundments, retention dams, and tailings ponds, on the surface or underground used in, or to be used in, or resulting from, the work of extracting such minerals from their natural deposits in nonliquid form, or if in liquid form, with workers underground, or used in, or to be used

in, the milling of such minerals, or the work of preparing coal or other minerals, and includes custom coal preparation facilities. In making a determination of what constitutes mineral milling for purposes of this chapter, the Secretary shall give due consideration to the convenience of administration resulting from the delegation to one Assistant Secretary of all authority with respect to the health and safety of miners employed at one physical establishment;

(2) For purposes of subchapters II, III, and IV, of this chapter, 'coal mine' means an area of land and all structures, facilities, machinery, tools, equipment, shafts, slopes, tunnels, excavations, and other property, real or personal, placed upon, under, or above the surface of such land by any person, used in, or to be used in, or resulting from, the work of extracting in such area bituminuous coal, lignite, or anthracite from its natural deposits in the earth by any means or method, and the work of preparing the coal so extracted, and includes custom coal preparation facilities;

(i) 'work of preparing the coal' means the breaking, crushing, sizing, cleaning, drying, mixing, storing and loading of bituminous coal, lignite, or anthracite, and such other work of preparing such coal as is usually done by the operator of the coal mine."

"30 U.S.C.A. §813 Inspections, investigations, and recordkeeping—Purposes; advance notice; frequency; guidelines; right of access

(a) Authorized representatives of the Secretary or the Secretary of Health, Education, and Welfare shall make frequent inspections and investigations in coal or other mines each year for the purpose of (1) obtaining, utilizing, and disseminating information relating to health and safety

conditions, the causes of accidents, and the causes of diseases and physical impairments originating in such mines, (2) gathering information with respect to mandatory health or safety standards, (3) determining whether an imminent danger exists, and (4) determining whether there is compliance with the mandatory health or safety standards or with any citation, order, or decision issued under this subchapter or other requirements of this chapter. In carrying out the requirements of this subsection, no advance notice of an inspection shall be provided to any person, except that in carrying out the requirements of clauses (1) and (2) of this subsection, the Secretary of Health, Education and Welfare may give advance notice of inspections. In carrying out the requirements of clauses (3) and (4) of this subsection, the Secretary shall make inspections of each underground coal or other mine in its entirety at least four times a year, and of each surface coal or other mine in its entirety at least two times a year. The Secretary shall develop guidelines for additional inspections of mines based on criteria including, but not limited to, the hazards found in mines subject to this chapter, and his experience under this chapter and other health and safety laws. For purpose of making any inspection or investigation under this chapter, the Secretary, or the Secretary of Health, Education and Welfare, with respect to fulfilling his responsibilities under this chapter, or any authorized representative of the Secretary or the Secretary of Health, Education and Welfare, shall have a right of entry to, upon, or through any coal or other mine."

Appendix D

APPENDIX D

TEXT OF CONSTITUTIONAL PROVISIONS INVOLVED

"Amendment IV—Searches and Seizures

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Appendix E

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

Case No. 79-C-114

RAY MARSHALL, Secretary of Labor,
United States Department of Labor,

Plaintiff

vs.

DOUGLAS DEWEY and WAUKESHA LIME & STONE CO., Waukesha, Wisconsin,

Defendants

MEMORANDUM AND ORDER

This is a simple case, factually. The government, through one Walter C. Brey, wishes to inspect defendant's quarry pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§801-960. To illustrate the dangers of a quarry, the government points to the death of Douglas J. Bartell, who "was killed on September 16, 1975 when he was buried in a mexture of gravel and limestone" at defendant's site. (Brey Affidavit).

Mr. Brey inspected defendant's location on September 17, 1975 and issued two notices of violations of safety standards. On April 25, 26 and 27 of 1978, Mr. Brey conducted a followup safety and health inspection at which time 25 citations were issued for violations of mandatory health and safety standards. Then, on July 10, 1978, Mr. Brey returned to make another inspection in order to determine whether defendant had corrected one problem, namely the exposure to silica-bearing dust by an employee bagging lime. Defendant refused to permit Mr. Brey to conduct a search and demanded he obtain a valid search warrant prior to inspection.

The government in this action is seeking a preliminary injunction enjoining defendant from refusing to permit inspection of its mines. The sole issue presented by this action is whether the Federal Mine Safety and Health Act, as applied to quarries, permits the government through the Secretary of Labor to conduct warrantless searches.

In order to grant a preliminary injunction, four prerequisites must be met: (1) plaintiff must show that he has no adequate remedy at law and will be irreparably harmed if the injunction does not issue; (2) that the plaintiff has a reasonable likelihood of success on the merits; (3) that in granting the preliminary injunction, the Court will not disserve the public interest; and (4) that any threatened injury to the plaintiff outweighs the inju ' the injunction may cause the defendant. *Fox Valley Harvestore, Inc. v. A. O. Smith Harvestore Products,* 545 F.2d 1096 (7th Cir. 1976). Furthermore, plaintiff has the burden of persuasion on all of these prerequisites. *Id.*

Although all four elements must be overcome before a preliminary injunction will issue, in this case particular

emphasis must be placed upon the second element, namely plaintiff's likelihood of success on the merits. The key decision bearing on this case is the Supreme Court's holding in *Marshall v. Barlow's, Inc.,* 436 U.S. 307 (1978) wherein the Court held that the Occupational Health and Safety Act (OSHA) did not permit the government to conduct warrantless searches.

In ruling on the issue presented in *Barlow's,* the Supreme Court held that there are exceptions to the search warrant requirements, *e.g.,* those businesses subject to close supervision or regulation. *United States v. Biswell,* 406 U.S. 311, 316 (1972) and *Colonnade Catering Corp. v. United States,* 397 U.S. 72, 74, 77 (1970). In discussing why warrantless searches are permitted in certain industries (*e.g.* liquor and firearms) the Court stated "when an entrepeneur embarks upon such a business, he has voluntarily chosen to subject himself to a full arsenal of governmental regulation." *Marshall v. Barlow's, Inc.,* 436 U.S. at 313. In further elucidating the limited class of searches in which a warrant in not required the Court held "The element that distinguishes these enterprises from ordinary businesses is a long tradition of close government supervision, of which any person who chooses to enter such a business must already be aware." *Id.*

The only conclusion that can be drawn from reading the Court's decision in *Marshall v. Barlow's, Inc., supra,* is that warrantless searches are only permissible in extremely narrow circumstances. In reviewing the facts of the present case, this Court is drawn to the conclusion that the Federal Mine Safety and Health Act of 1977, as applied to quarries, does not permit the Secretary of Labor to conduct warrantless searches.

First, the Federal Coal Mine Health and Safety Act of 1969 was only amended to cover mines other than coal mines in 1977 by Public Law 95-164. The Act as applied to other mines did not even become effective until March 9, 1978. Therefore, the long continuous regulation mentioned by the Supreme Court is absent. Secondly, the Secretary does not describe any unusual circumstances in the quarry type of businesses to necessitate a warrantless search.

Plaintiff cites *Youghiogheny and Ohio Coal Co. v. Morton,* 364 F. Supp. 45 (S.D. Ohio 1973) for the proposition that warrantless searches in mines are permissible. First, that case dealt with underground coal mines rather than quarries; second, that case was decided prior to *Marshall v. Barlow's, Inc., supra,* and thus that case must be placed in the balance. With these distinctions in mind, the Court does not find that a warrantless search is justified in this case, even assuming that *Youghiogheny* is correct.

Therefore, since the Secretary of Labor has failed to show a reasonable likelihood of success on the merits, his motion for a preliminary injunction must be and hereby is denied.

Defendants have requested the Court, however, to issue a preliminary injunction in its favor. Defendants express the fear that the government will try further warrantless searches and then issue citations to defendants for their refusal. Defendants' request must be denied at this time. The government has represented to the Court that it will not pursue any warrantless searches. If the government does attempt to conduct searches and issues citations, the Court stands ready to reconsider defendants' request. At this time, the irreparable harm element is absent.

Therefore, plaintiff's petition for a preliminary injunction must be and hereby is denied. Furthermore, defendants' request for a preliminary injunction is also denied.

SO ORDERED this 29th day of March, 1979, at Milwaukee, Wisconsin.

(s) Robert W. Warren
United States District Judge

Appendix E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

Case No. 79-C-114

RAY MARSHALL, Secretary of Labor,
United States Department of Labor,

Plaintiff

vs.

DOUGLAS DEWEY and WAUKESHA LIME & STONE CO., Waukesha, Wisconsin

Defendants

MEMORANDUM AND ORDER

On March 9, 1979, an oral hearing was held on plaintiff's motion for a preliminary injunction, and based upon oral argument and written briefs, the Court denied plaintiff's motion. The Court's opinion, which was read into the record on March 9, 1979, was put into written form and signed on March 29, 1979. Plaintiff has moved for reconsideration, claiming that the Court erred when it held that quarries were not pervasively regulated industries.

In the present case, plaintiff seeks to enjoin defendant from refusing to permit plaintiff to conduct inspections without warrants. Of course warrantless searches are ordinarily impermissible. However, the Supreme Court has recognized that in certain limited circumstances, warrantless searches are permitted. *Marshall v. Barlow's, Inc.*, 436

Appendix E

U.S. 307 (1978); *United States v. Biswell*, 406 U.S. 311 (1972); *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970). In *Barlow's*, the Supreme Court articulated why warrantless searches are permissible in certain industries (*e.g.*, liquor and firearms) by stating "when an entrepeneur embarks upon such a business, he has voluntarily chosen to subject himself to a full arsenal of governmental regulation." The court further stated "the element that distinguishes these enterprises from ordinary businesses is a long tradition of close government supervision, of which any person who chooses to enter such a business must already be aware." *Barlow's, Inc.*, 436 U.S. at 313. The question presented in the present case is whether the stone quarry industry is pervasively regulated.

The Court would note that the first federal statute regulating stone quarries was the Federal Metal and Nonmetallic Mine Safety Act, 30 U.S.C. §721 *et seq.*, enacted by Congress in 1966. This legislation is discussed in S. Rep. No. 1296, 89th Cong., 2d Sess. 2, reprinted in [1966] U.S. Code Cong. & Ad. News 2846. In that report, it is pointed out that in 1961 Public Law 87-300 was passed authorizing the Secretary of the Interior to conduct a study of state mine safety laws and the health hazards of mines. Apparently this report, attached as an appendix to plaintiff's brief, formed the basis of the 1966 legislation. The Federal Metal and Nonmetallic Mine Safety Act, 30 U.S.C. §721 *et seq.* was succeeded by the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §801 *et seq.* The latter act, specifically 30 U.S.C. §813 (a), permits warrantless inspections.

Regulation of stone quarries by the federal government, therefore, commenced in 1966. Prior to the federal

laws, some of the several states regulated mines, but in a haphazard and ineffective manner. The federal legislation passed in 1966, as reflected by Senate Report 1296, was aimed at comprehensive regulation.

In this Court's opinion, the tradition of pervasive regulation of the stone quarry industry did not commence until 1966. The survey conducted pursuant to Public Law 87-300 shows loose and at times non-existent regulation of stone quarries prior to the federal regulation enacted in 1966. Several federal district courts have found that the mining industry, *i.e.*, gravel quarries and the like, is pervasively regulated such that warrantless inspections are permissible. *Marshall v. The Texoline Co.*, No. 4-78-49 (N.D. Texas, Mar. 23, 1979); *Marshall v. Nilochucky Sand Co.*, No. 2-78-108 (E.D. Tenn. Dec. 14, 1978); *Marshall v. Elden Wait*, No. S-78-11 (E.D. Cal. May 1978); *Andrus v. Magma Copper Co.*, No. 77-765 (D. Ariz. Jan. 16, 1978). In an action brought before Chief Judge Reynolds of this district, he found that the plaintiff had not shown that the stone quarry industry was pervasively regulated and thus he denied plaintiff's motion for a preliminary injunction. *Marshall v. Halquist Stone Co.*, No. 78-C-463 (E.D. Wis. Sept. 15, 1978).

The fourth amendment to the United States Constitution means what it says. Notwithstanding the Supreme Court having noticed several exceptions to the warrant requirement, in this Court's opinion, the pervasive regulation of the type found in the liquor industry, *e.g.*, had not existed until congress entered the field. Such late entry cannot meet the requirements set forth in *Barlow's, supra.*

Having reviewed the materials submitted by plaintiff, being aware of the flexible nature of the requirement that

plaintiff must make a showing of "reasonable success on the merits," *Mullis v. Arco Petroleum*, 502 F.2d 290, 293 (7th Cir. 1974), and cognizant of "the presumption of constitutionality to which every duly enacted state and federal law is entitled . . . ," *Lockport v. Citizens of Community Action*, 430 U.S. 259, 272 (1977), the Court, on reconsideration, must deny plaintiff's motion for a preliminary injunction. Plaintiff has not made the necessary showing under *Fox Valley Harvestore, Inc. v. A. O. Smith Harvestore Products*, 545 F.2d 1096 (7th Cir. 1976).

SO ORDERED this 30th day of May, 1979, at Milwaukee, Wisconsin.

(s) Robert W. Warren
United States District Judge

Appendix E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

C.A. No. 78-C-463

RAY MARSHALL, Secretary of Labor,
United States Department of Labor,

Plaintiff

v.

HALQUIST STONE COMPANY, INC., t/a/d/b/a Halquist Stone Company, Inc., Lannon Quarry and Mill,

Defendants

DECISION AND ORDER

The United States Secretary of Labor has moved the court for a preliminary injunction pursuant to §108 of the Federal Mine Safety and Health Act of 1977. The Secretary asserts that §103 (a) of the Act, granting the Secretary a right of entry into coal and other mines, including the stone quarry in this case, is constitutional. For the reason stated briefly below, without reaching the question of the constitutionality of the statute, this Court finds that the record established in this hearing is insufficient to allow the Court to grant the preliminary injunction.

On June 1, 1978, Albin Halquist, agent of the defendant Halquist Stone Company, refused to permit an authorized representative of the Secretary of Labor, Mr. Walter

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C. Brey, to inspect the Lannon Quarry and Mill in Lannon, Wisconsin. Mr. Halquist demanded that a search warrant be obtained prior to inspection. In defense of his refusal to allow the inspection, Mr. Halquist points to the recent decision in *Marshall v. Barlow's, Inc.*, 46 U.S.L.W. 4483 (May 23, 1978).

Marshall v. Barlow's, Inc., has called the right-of-entry provisions in the federal statutes into question. The Court declared the Occupational Safety and Health Act of 1970 to be unconstitutional insofar as it authorized inspection without a warrant. The Court, however, allowed for an exception to the warrant requirement in pervasively regulated industries.

The precise issue in this case is whether a stone quarry is a pervasively regulated industry and, thus, within the exception to the warrant requirement. In contending that it is, the plaintiff refers to the statement of the congressional purpose in the Act, 30 U.S.C. §801, as "evidence of the fact" that Congress has made findings as to the degree of regulation that all of the industries covered by the Act are subject to. Such a declaration by Congress, standing alone, is not sufficient for this Court to find that a stone quarry is part of a "pervasively regulated" industry and that the Secretary is likely to prevail on the merits of this action.

IT IS THEREFORE ORDERED that the plaintiff's motion for a preliminary injunction is denied.

Dated at Milwaukee, Wisconsin, this 15 day of Sept., 1978.

(s) John W. Reynolds
John W. Reynolds, *Chief Judge*

Appendix E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

CIV. NO. 79-391-B
Consolidated with Nos. 79-393, 79-422 & 79-454

VALLEY TRANSIT MIX, INC. and VALLEY TRANSIT MIX, INC. d/b/a ATLAS LAND COMPANY, INC., New Mexico Corporations,

Plaintiffs

vs.

RAY F. MARSHALL, Secretary, United States Department of Labor,

Defendant

CIV. NO. 79-393

WALLACH CONCRETE PRODUCTS, INC.,
a New Mexico Corporation,

Plaintiff

vs.

RAY F. MARSHALL, Secretary, United States Department of Labor,

Defendant

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CIV. NO. 79-422

RAY MARSHALL, Secretary of Labor,
United States Department of Labor,

Plaintiff

vs.

WALLACH CONCRETE PRODUCTS COMPANY,

Defendant

CIV. NO. 79-454

RAY MARSHALL, Secretary of Labor,
United States Department of Labor,

Plaintiff

vs.

VALLEY TRANSIT MIX, INC., d/b/a
ATLAS LAND CO., INC.,

Defendant

MEMORANDUM OPINION

This action is a consolidation of four separate lawsuits arising out of two attempted warrantless inspections by Federal Mine Safety and Health Administration inspectors pursuant to the Mine Safety and Health Act (MSH).[1] In

[1] 30 U.S.C. 801 *et seq.*

both instances the company refused to allow the inspector to inspect the sand and gravel operation. In cause 79-391-B Valley Transit Mix, Inc. and Altas Land Company, Inc. (Valley) seeks to declare the warrantless search provisions of MSH unconstitutional and enjoin the inspectors from conducting further warrantless inspection of its sand and gravel operation. In cause 79-454-B, Ray Marshall, the Secretary of Labor (Secretary) asks the Court to enjoin Valley from refusing to admit an inspector or from interfering with his inspection. Causes 79-393-B and 79-422-B are similarly related. In 79-393-B Wallach Concrete Products, Inc. (Wallach) seeks an order declaring the warrantless inspections unconstitutional and to enjoin any further warrantless inspections under MSH. In 79-422-B the Secretary seeks to enjoin Wallach from refusing to admit his representative or from interfering with any inspections conducted under the Act. All parties seek a preliminary injunction. The matter was set down for hearing and the Court having heard the parties and considered the memoranda on file, together with the entire file herein concludes for the reasons set forth below that none of the applications for preliminary injunction is well taken at this time and the applications should be denied.

The standard for determining whether a preliminary injunction should be issued is well defined.[2] There are four factors to be considered:

1. A likelihood that the movant will prevail on the merits.

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[2] *Fox Valley Harvestore, Inc. v. A. O Smith Harvestore Products,* 545 F.2d 1096 (7th Cir. 1976); *Associated Securities Corp. v. SEC,* 283 F.2d 773 (10th Cir. 1960).

2. Irreparable injury to the movant if the relief is not granted.

3. No harm to the public interest if the application is granted.

4. The threatened injury to movant outweighs the injury the injunction may cause the defendant.

The Court will first consider the Secretary's application. Generally statutes allowing warrantless administrative inspections are invalid. *Marshall v. Barlow's, Inc.,* 436 U.S. 307 (1978); *Camera v. Municipal Court,* 387 U.S. 523 (1967); *See v. City of Seattle,* 387 U.S. 541 (1967). There are, however, some exceptions to this general rule. *United States v. Biswell,* 406 U.S. 311 (1972); *Colonnade Catering Corp. v. United States,* 397 U.S. 72 (1970). In *Barlow's* the Supreme Court carefully considered the exceptions and determined that warrantless searches were valid only in "relatively unique circumstances." The Court reaffirmed the principle that warrantless searches may be justified in businesses that are subject to close supervision or pervasive governmental regulations. The Court stated that, "when an entrepreneur embarks upon such a business, [one that is pervasively regulated] he has voluntarily chosen to subject himself to a full arsenal of governmental regulations." *Barlow's, supra* at 313.

In the present actions the Secretary argues that mines are pervasively regulated and therefore fall within the *Biswell-Colonnade* exception. The companies disagree claiming the warrantless inspections of their sand and gravel pits are similar to the warrantless inspections under OSHA which were declared unconstitutional in *Barlow's.* The Secretary has not carried his burden of showing a likeli-

hood of success on the merits. At this time the Court is not convinced that the sand and gravel business is subject to the kind of pervasive regulation that would allow warrantless inspections. Unlike the liquor (*Colonnade*) and the firearm (*Biswell*) industries the sand and gravel industry does not "have a long tradition of close government supervision, of which any person who chooses to enter such a business must already be aware." *Barlow's, supra* at 313.

The Secretary argues that *Youghiogheny and Ohio Coal Co. v. Morton,* 364 F. Supp. 45 (S.D. Ohio 1973) is controlling. In that case the court allowed the warrantless inspection of an underground coal mine. The court ruled that the inherently dangerous working condition warranted the pervasive regulations and hence the warrantless inspections. This Court finds *Youghiogheny* unpersuasive for two reasons. First, it was decided prior to *Barlow's* and must be reexamined in light of *Barlow's.* Second, and most significantly, it dealt with the warrantless inspection of an underground coal mine and not open pit sand and gravel operations. The present record is devoid of any indication of more inherent danger to workers in an open sand and gravel pit than to workers in any other heavy construction operation. Therefore, the Secretary's application for a preliminary injunction will be denied.

Turning to the companies' application, the Court, in light of the Secretary's policy of not attempting additional warrantless inspections prior to the termination of the judicial proceeding unless there is an accident or other unusual occurrence, concludes that the companies have not shown they will suffer any irreparable injury if their application is not granted. Therefore the companies' applications will be denied.

The matter will be set down for a hearing on the merits. A separate order will be entered in accordance with this Opinion.

(s) Howard Ritter
United States District Judge